

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRYAN P. SEXTON, Derivatively on Behalf of JONES SODA COMPANY,	)	No. C07-1782RSL
Plaintiff,	)	
v.	)	
PETER M. VAN STOLK, <i>et al.</i> ,	)	ORDER CONSOLIDATING ACTIONS AND APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL
Defendants.	)	
	)	
JON BAUM, Derivatively on Behalf of JONES SODA COMPANY,	)	No. C08-0018RSL
v.	)	
PETER M. VAN STOLK, <i>et al.</i> ,	)	
Defendants.	)	

This matter comes before the Court on “Plaintiff Jon Baum’s Motion to Consolidate Related Shareholder Derivative Actions and to Appoint Lead Plaintiff and Lead Counsel” (Dkt. # 16) and plaintiff Bryan P. Sexton’s cross-motion (Dkt. # 38). The parties agree that these derivative suits should be consolidated, but plaintiffs disagree about who should control the litigation. Defendants have wisely taken no position on the appointment of lead plaintiff or lead counsel.

1           Having reviewed the memoranda, declarations, and exhibits submitted by the  
2 parties, the Court finds as follows:

3           (1) Pursuant to Fed. R. Civ. P. 42(a), the above-captioned matters are hereby  
4 consolidated for all purposes. All documents filed in the future regarding these matters are to be  
5 filed under the caption Sexton v. Van Stolk, et al., Cause No. C07-1782RSL. Counsel shall  
6 make efforts to identify all cases, other than those identified above, which might properly be  
7 consolidated as part of this action, whether the cases are currently pending before the Court or  
8 are later filed in or transferred to this district. No additional documents shall be filed in Cause  
9 No. C08-0018RSL.

10           (2) If any other derivative actions asserting substantially the same claim or claims on  
11 behalf of Jones Soda Company are identified, lead counsel shall notify the Court and serve a  
12 copy of this Order on the attorneys for plaintiff(s) and any new defendant(s) in the newly-  
13 identified case. The case shall then be consolidated under Cause No. C07-1782RSL unless a  
14 party in the newly-identified case files, within ten (10) days after the date upon which a copy of  
15 this Order is served on them, an application for relief from this Order or any provision herein  
16 and the Court deems it appropriate to grant such application.

17           (3) As recognized by all parties, courts have the inherent power to consolidate actions  
18 and appoint lead counsel in order to supervise and coordinate the prosecution of a derivative  
19 action. Vincent v. Hughes Air West, Inc., 557 F.2d 759, 774 (9th Cir. 1977). Such coordination  
20 is intended “to redound to the benefit of all parties to the litigation” (Id., (quoting MacAlister v.  
21 Guterman, 263 F.2d 65, 69 (2d Cir. 1958)), and the Court is acutely aware of the need to manage  
22 this litigation efficiently so that the costs do not swallow the recovery. See Joy v. North, 692  
23 F.2d 880, 887 (2d Cir. 1982).

24           (4) The Court hereby appoints Bryan P. Sexton as lead plaintiff. Mr. Sexton has  
25 consistently shown a personal interest in this litigation and, as far as the Court can tell, has not  
26

1 taken any steps that are antithetical to the real party in interest, Jones Soda Company. Jon  
2 Baum's interest in the litigation, on the other hand, is more doubtful: he was apparently  
3 unavailable to verify the complaint, has not averred that he even reviewed the complaint before  
4 it was filed, and was not personally involved in this lead plaintiff dispute until his absence  
5 became conspicuous. In addition, it is almost impossible to paint Mr. Baum's initiation of this  
6 second federal derivative action as an act taken in the best interests of the company. Any  
7 deficiency in Mr. Sexton's complaint could have been remedied in a more cost-effective and  
8 productive manner by simply contacting plaintiff's counsel informally: by filing a competing  
9 copycat action, Mr. Baum initiated a shareholder battle and increased the costs of this litigation  
10 with no appreciable benefit to the company or the absent shareholders.

11 (4) The Court hereby appoints Federman & Sherwood as lead counsel and Mikkeltorg,  
12 Broz, Wells & Fryer PLLC as liaison counsel. Mr. Sexton's choice of counsel is entitled to  
13 some weight in this matter, especially in light of his involvement in this litigation and his  
14 relationship with counsel. To be perfectly candid, neither of the proposed leadership structures  
15 has been particularly impressive so far, but the Court finds the actions and errors of the  
16 Federman/Mikkeltorg group to be less objectionable than those of the Robbins/Fosler group.  
17 The decision to file a copycat action rests as much with Robbins/Fosler as with Mr. Baum, and  
18 the failure to obtain a client verification may be just as problematic as Federman/Mikkeltorg's  
19 failure to allege jurisdictional facts with particularity. See Goldberg v. Meridor, 81 F.R.D. 105,  
20 110 (S.D.N.Y. 1979).<sup>1</sup> In addition, Robbins/Fosler's inability to comply with the local civil  
21 rules on a consistent basis does not recommend their services to this Court.

22 (5) Lead counsel shall have the following responsibilities and duties, to be carried out  
23 either personally or through counsel whom lead counsel shall designate:

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiff Baum has not identified any deficit in plaintiff Sexton's demand futility allegations –  
26 almost all of plaintiff Baum's allegations on this point can be found in plaintiff Sexton's complaint.

- a. to coordinate the filing of a consolidated amended complaint;
- b. to coordinate the briefing and argument of any and all motions;
- c. to coordinate the conduct of any and all discovery proceedings;
- d. to coordinate the examination of any and all witnesses in depositions;
- e. to coordinate the selection of counsel to act as spokesperson at all pretrial conferences and hearings;
- f. to call meetings of the plaintiffs' counsel as they deem necessary and appropriate from time to time;
- g. to coordinate all settlement negotiations with counsel for defendants;
- h. to coordinate and direct the pretrial discovery proceedings, the preparation for trial, the trial, and the post-trial proceedings in this matter;
- i. to coordinate the preparation and filings of all pleadings; and
- j. to supervise all other matters concerning the prosecution or resolution of the consolidated actions.

(6) No motion, discovery request, or other pretrial proceedings shall be initiated or filed by any plaintiff without the approval of lead counsel, so as to prevent duplicative pleadings or discovery by plaintiffs. No settlement negotiations shall be conducted without the approval of lead counsel.

(7) Lead counsel shall be the contact between plaintiffs' counsel and defendants' counsel, as well as the spokesperson for all plaintiffs' counsel, and shall direct and coordinate the activities of plaintiffs' counsel.

(8) Lead counsel shall be the contact between the Court and plaintiffs and their counsel.

(9) Lead counsel shall have the responsibility of receiving and disseminating to plaintiffs all documents filed in the court records.

(10) Lead counsel shall organize, coordinate, and conduct this litigation in the most cost-

1 effective manner possible. Having won the role of lead counsel, Federman & Sherwood should  
2 be aware that the Court takes seriously its obligations to the real party in interest and the  
3 unrepresented shareholders. The complaint in this matter alleges that Jones Soda Company's  
4 stock fell more than 60% as a result of defendants' malfeasance and that defendants reaped "a  
5 windfall of millions of dollars" through insider trading. Sexton Complaint at ¶ 54. Settlements  
6 of the type presented to the Honorable Marcia S. Krieger and the Honorable Charles R. Breyer  
7 (wherein Federman & Sherwood asked for hundreds of thousands of dollars in fees while  
8 obtaining no monetary benefit for the corporation and only the vaguest "corporate governance"  
9 improvements) will be scrutinized and possibly rejected if the best interests of the corporation  
10 are not materially advanced. Immediate dismissal of this action would be preferable to an  
11 aggressive litigation strategy that simply increases the corporation's losses. The argument raised  
12 in previous litigations – that a meager settlement is appropriate because the derivative claims are  
13 subject to dismissal for failure to make a demand – would not save an outsized fee award. The  
14 decision to file the complaint without making a demand can be laid squarely at counsel's door,  
15 and an award of fees for such a miscalculation seems, at least in the abstract, absurd.

16  
17 For all of the foregoing reasons, the above-captioned matters are consolidated,  
18 plaintiff Bryan P. Sexton is appointed as lead plaintiff, Federman & Sherwood is appointed as  
19 lead counsel, and Mikkelsen, Broz, Wells & Fryer PLLC is appointed as liaison counsel. The  
20 Clerk of Court is directed to file this Order in Cause No. C08-0018RSL and then close that case.

21  
22 Dated this 10th day of April, 2008.

23 

24 Robert S. Lasnik  
25 United States District Judge  
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